

SERVED: May 31, 2007

NTSB Order No. EA-5287

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 29<sup>th</sup> day of May, 2007

_____	)	
MARION C. BLAKEY,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-17381
v.	)	
	)	
MARIO NICKL,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

Respondent appeals the written initial decision of Administrative Law Judge Patrick G. Geraghty, issued on April 6, 2006, following an evidentiary hearing.<sup>1</sup> By that decision, the law judge affirmed an order of the Administrator that suspended

<sup>1</sup> A copy of the law judge's order is attached.

respondent's commercial pilot certificate for 45 days, based on a violation 14 C.F.R. § 91.13(a).<sup>2</sup> We deny respondent's appeal.

The Administrator's April 13, 2005 order functions as her complaint against respondent, and alleges that on or about October 27, 2004, respondent was the pilot-in-command (PIC) of a Bell Helicopter, Model BHT-212, during an external load operation in Draper, Utah. The Administrator alleges that, while conducting an external load operation to retrieve a crashed aircraft and transport the wreckage to a location from which another entity could transport it away, respondent engaged in the operation with passengers on board. In particular, the Administrator alleges in her complaint that respondent's last flight transported a gas-powered circular cut-away saw and external wing tip tank from the crashed aircraft in a sling while four passengers were aboard the helicopter. The Administrator also alleges that none of the passengers were crewmembers, or were otherwise necessary for the external load operation. Based on these allegations, the Administrator charged respondent with violating 14 C.F.R. § 91.13(a); in addition, in a separate case over which the Safety Board does not have jurisdiction, the Administrator charged respondent's

---

<sup>2</sup> Section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner so as to endanger the life or property of another person.

employer with violating 14 C.F.R. § 133.35(a).<sup>3</sup> The FAA case also proceeded to an evidentiary hearing for ascertaining the facts and circumstances surrounding respondent's conduct on October 27, 2004; given the relevancy of the testimony at that hearing, the parties stipulated to the admission of the transcript into evidence. Tr. at 8-9; Exh. R-1.

In the instant case, the law judge held an evidentiary hearing on January 27, 2006, at which the Administrator presented the testimony of two law enforcement personnel (Mr. Dennis Wilson and Ms. Trish Wasescha), an FAA special agent for hazardous materials and security (Mr. James Berk), and an FAA principal operations inspector (Mr. Lynn Higgins). Mr. Wilson, Ms. Wasescha, and Mr. Berk all testified that they were present during respondent's external load operation, and that they each observed passengers departing from the aircraft during the last flight, in which the helicopter that respondent was operating allegedly carried a gas-powered circular cut-away

---

<sup>3</sup> Section 133.35(a) prohibits certificate holders from allowing non-essential persons and crewmembers "to be carried during rotorcraft external-load operations." In Administrator v. Classic Helicopter Service, FAA Docket No. CP05NM0011, the Administrator charged respondent's employer with violating section 133.35(a). In the case at issue, however, respondent is not a part 133 certificate holder; therefore, the Administrator only alleges that respondent violated 14 C.F.R. § 91.13(a) by acting in a careless or reckless manner, based on respondent's alleged conduct in the external load operation.

saw and external wing tip tank in a sling. Mr. Higgins did not personally observe the events at issue, but testified that Mr. Berk informed him of the events, and that Mr. Berk's recollection of the events caused Mr. Higgins to instigate a certificate enforcement action against respondent.

At the hearing, respondent presented the testimony of Mr. Allen Woodhouse, who owns Spanish Fork Flying Service, which utilized respondent's employer's recovery and transportation services for the recovery of the aircraft wreckage. Mr. Woodhouse testified that he assisted with the external load operation. Respondent also presented the testimony of Rick Strong, who is employed at Spanish Fork Flying Service, and who also assisted with the operation. In addition, respondent provided his own testimony at the hearing.

The law judge affirmed the Administrator's order, which sought a 45-day suspension of respondent's commercial pilot certificate, based solely on a determination of credibility. The law judge carefully summarized all witnesses' testimony and reviewed all evidence in the record in determining that the Administrator's witnesses were more credible than respondent's witnesses. In particular, the law judge's decision indicates that he considered: the demeanor of each witness; any personal or business interests each witness may have in either party;

existence of any evidence that would indicate animosity or bias; and how, if at all, a particular resolution of the case would benefit each witness. Decision and Order at 10. The law judge considered each of these elements, and determined that the Administrator's witnesses were more credible than respondent's witnesses, given that each of respondent's witnesses had an interest in the outcome of the case. Id. Conversely, two of the Administrator's eyewitnesses had no interest in the outcome of the case, and no reason to describe the events in question inaccurately. Id. at 10-11. The law judge acknowledged that Mr. Berk had previously pursued a hazardous materials violation against respondent and respondent's employer, but concluded that respondent could not show that the Administrator's previous witnesses' testimony arose from a "grudge" that Mr. Berk maintained against respondent. Id. at 11. In weighing the evidence and assessing the credibility of each witness, the law judge concluded that the Administrator had shown that respondent violated 14 C.F.R. § 91.13(a), and ordered a 45-day suspension of respondent's certificate.

We have long held that the Board's law judges are in the best position to evaluate witnesses' credibility. Administrator v. Taylor, NTSB Order No. EA-4509 (1996) (stating that, "the law judge sees and hears the witnesses, and he is in the best

position to evaluate their credibility"). We have also held that credibility determinations are "within the exclusive providence of the law judge," unless the law judge has made the determinations "in an arbitrary or capricious manner."

Administrator v. Kocsis, 4 NTSB 461, 465 n.23 (1982); see also Administrator v. Smith, 5 NTSB 1560, 1563 (1986); Administrator v. Sanders, 4 NTSB 1062 (1983). In this regard, the Board is free to reject testimony that a law judge has accepted when the Board finds that the testimony is inherently incredible or inconsistent with the overwhelming weight of the evidence. Administrator v. Blossom, 7 NTSB 76, 77 (1990) (citing Administrator v. Powell, 4 NTSB 640 (1982), and Administrator v. Klayer, 1 NTSB 982 (1970)). Therefore, where parties challenge a law judge's credibility determinations, the Board will not reverse the determinations unless they are arbitrary, capricious, or clearly erroneous. Smith, supra, at 1563.

Both parties have stated that the case at issue is not complicated. Respondent's Br. at 1 (respondent's counsel); Tr. at 12 (Administrator's counsel). Both parties recognize that the resolution of this case depends upon a determination of witness credibility. Respondent's principal argument in urging the Board to overturn the law judge's decision is based on the contention that the law judge was biased against respondent's

counsel, and that, therefore, the law judge's credibility findings were unreasonable and contrary to the weight of the evidence. As such, respondent also submitted a motion to disqualify the law judge from this case in his appeal brief. The Administrator opposes respondent's arguments, both with regard to the law judge's neutrality and with regard to the credibility assessments.

We find that respondent's contention that the law judge was biased is without merit. Respondent's appeal brief alleges that respondent's counsel has not prevailed in other cases over which Judge Geraghty has presided, and that, "in the mid- to late-1980s," Judge Geraghty suspended a certificate belonging to one of respondent's counsel's clients after respondent's counsel was too ill to attend a hearing. Respondent's Br. at 17. Respondent also maintains that Judge Geraghty's employment with the FAA, which concluded decades ago, has rendered him biased and unable to preside fairly over the case at issue. We recognize that our regulations include the following provision with regard to disqualification of law judges:

*Disqualification.* A law judge shall withdraw from a proceeding if, at any time, he or she deems himself or herself disqualified. If the law judge does not withdraw, and if an appeal from the law judge's initial decision is filed, the Board will, on motion of a party, determine whether the law judge should have withdrawn and, if so, order appropriate relief.

49 C.F.R. § 821.35(c). We have previously acknowledged Judge Geraghty's former employment with the FAA, and have determined that such a history does not preclude him from presiding over cases at the Safety Board, as Judge Geraghty's former employment does not establish that he has prejudged any case.

Administrator v. Hill, 5 NTSB 1479, 1480 (1986). With regard to respondent's counsel's allegations that Judge Geraghty has a personal bias against him because he did not attend a particular hearing 17 years ago, respondent's counsel's assertion is not timely. In Hill, we held that a party must raise any allegation of a law judge's bias "at the first reasonable opportunity after discovery of the facts that support the allegation." Id.

(citing the Administrative Procedure Act, 5 U.S.C. § 556).

Here, given that the law judge's supposed bias is based on an event that occurred numerous years ago, respondent's counsel could have raised this issue earlier in the case. Moreover, a careful review of the transcript indicates that Judge Geraghty allowed respondent's counsel to question each witness sufficiently and received each exhibit that respondent's counsel offered.<sup>4</sup> In general, respondent has not shown that

---

<sup>4</sup> We also note that law judges have broad discretion in conducting hearings and admitting evidence, and we have long held that determinations of relevance and admissibility of



Judge Geraghty prejudged the case or presided over the hearing in a biased manner.

With regard to the law judge's credibility determinations, respondent has not shown that the determinations were arbitrary, capricious, or contrary to the weight of the evidence. After a careful review of the evidentiary record, we agree with the law judge's determinations, given that the Administrator presented two witnesses who were completely disinterested in the outcome of the case, while each of respondent's witnesses had either a business or personal relationship with respondent. Moreover, the record indicates that respondent was running low on fuel at the time of the event, and therefore had a motive to transport passengers simultaneously with an external load. Tr. at 74, 133. In addition, although respondent asserts that the chain of events that the Administrator argues occurred were impossible because no one would have been present to attach the external load at the crash site, respondent has not contradicted the Administrator's assertion, based on testimony at the hearing,

---

(..continued)

proffered evidence rests in the sound discretion of the law judge. Administrator v. Bennett, NTSB Order No. EA-5258 (2006) (citing Administrator v. Santana, NTSB Order No. EA-5152 at 3 (2005), and 49 C.F.R. § 821.35(b)). Respondent does not identify any errors in the law judge's oversight of the hearing in the case at hand, but merely asserts the law judge was biased.

that the aircraft had a self-hook mechanism for attaching the external load. Tr. at 159-160; Exhs. C-1, C-2. Respondent also contends that the Administrator's witnesses' testimony at the previous FAA hearing contradicts testimony that the witnesses provided for the hearing in the case at hand. We do not find that any of the inconsistencies that respondent identifies are material to the outcome of this case, and note that respondent's witnesses' testimony also contained inconsistencies. See Administrator's Appeal Br. at 27 (comparing the transcript from the FAA hearing to the transcript from the hearing in the case at hand). Overall, we do not find that the law judge's credibility determinations were arbitrary, capricious, or against the weight of the evidence that the record contains.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied; and
2. The 45-day suspension of respondent's certificate shall begin 30 days after the service date indicated on this opinion and order.<sup>5</sup>

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

---

<sup>5</sup> For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).